Indiana, 489 U.S. 46 (1989), for example, the Court denied a vagueness challenge to an Indiana statute that broadly deemed any book or film "obscene" if, among other things, it "depicts or describes, in a patently offensive way, sexual conduct." See *id.* at 57-58 & n.6. That portion of the statute, which is based on the obscenity formulation announced in *Miller* v. *California*, 413 U.S. 15, 24 (1973), is virtually indistinguishable from the Commission's generic definition of indecency. Because the former is sufficiently determinate to withstand a vagueness objection, the latter is as well.[24]

Petitioners seek to avoid that conclusion by observing that no work is obscene under *Miller* unless it meets two additional criteria: (1) "the average person, applying contemporary community standards," must find that the work, "taken as a whole, appeals to the prurient interest," and (2) the work, taken as a whole, must "lack[] serious literary, artistic, political, or scientific value." 413 U.S. at 24. Yet each of the three elements of this Court's obscenity definition is conceptually independent of the other two. It is thus illogical to claim, as petitioners do, that the legal standard embodied in one of those elements ("patently offensive" depictions of "sexual conduct," see *ibid.*) can be unconstitutionally vague where indecency regulation is concerned, but permissible in an anti-obscenity statute (which, in contrast to the situation here, typically involves the imposition of criminal sanctions).

Petitioners also cite a provision of Section 10(a) entitling cable operators to bar material that they "reasonably believe[]" is indecent. See, *e.g.*, Alliance Br. 45-46; DAETC Br. 31. Apart from the state action issues raised by any challenge to Section 10(a), see pp. 13-23, *supra*, the "reasonable belief" standard, far from expanding or blurring the scope of what is covered under Section 10,

---

[24] Although petitioners appear to suggest otherwise, see Alliance Br. 44-45; DAETC Br. 32, this Court's precedents permit federal regulation of obscenity on a national scale. See *Sable*, 492 U.S. at 125; *Hamling* v. *United States*, 418 U.S. 87, 104-105 (1974).

simply ensures that no operator may exercise editorial control over disputed programming unless its determination of indecency is objectively "reasonable." In any event, the federal courts will resolve disputes between leased access programmers and cable operators concerning what constitutes "indecent programming" for purposes of Section 10(a), see Pet. App. 144a-145a, and the Commission will resolve such disputes for purposes of Section 10(b), see *id.* at 167a-168a & n.55; see also Alliance Br. 14-15. Similarly, PEG programmers may appeal to local franchise authorities to resolve disputes with cable operators about whether given programming is indecent for purposes of Section 10(c). See Pet. App. 194a. Petitioners suggest no basis for claiming that either the courts, the FCC, or local authorities would be unable to resolve such disputes. In any event, such speculation, without any factual or historical basis, cannot support a vagueness challenge to a regulation of indecent expression. See *Pacifica*, 438 U.S. at 743 (plurality opinion); *id.* at 761 n.4 (Powell, J., concurring in part and concurring in the judgment).

2. The Court's decisions in this area embody a judgment that the social necessity of subjecting indecency and obscenity to special regulation outweighs whatever unavoidable indeterminacy inheres in any definition of those two categories of expression. At bottom, petitioners ask this Court to disavow that judgment and forbid any governmental effort to regulate indecency in any medium. Petitioners offer no alternative definition of indecency that would avoid the supposed vagueness problems that they attribute to the traditional definition. Instead, they complain about the supposed difficulty of any effort to distinguish indecent from non-indecent speech.

Revealingly, however, petitioners confine almost all of their discussion of supposedly close cases to hypothetical controversies, see, *e.g.*, DAETC Br. 30, 35, and make no serious effort to show that the FCC has, in fact,

erroneously designated material (in any medium) as "indecent."[25] Nor do petitioners cite a single case in which any court has reversed an FCC finding of indecency. That is no accident, for the Commission has consistently taken pains, in close cases, to err on the side of determining that material is not legally indecent. See *Action for Children's Television* v. *FCC*, 59 F.3d 1249, 1261 (D.C. Cir. 1995) ("so far as this record shows the FCC is not enforcing the statutory ban on indecency against material that is not indecent"), cert. denied, No. 95-620 (Jan. 16, 1996).

The FCC's long-standing caution in this area led the Court in *Pacifica* to deny claims that the Commission's treatment of indecency would chill protected speech. See 438 U.S. at 743 (plurality opinion); *id.* at 761 n.4 (Powell, J., concurring in part and concurring in the judgment). Where, as here, a vagueness challenge to indecency regulations is speculative—and, for that matter, historically baseless—the proper course is "not * * * [to] pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable," but rather to "deal with those problems if and when they arise." *Id.* at 743 (plurality opinion); *id.* at 761 n.4 (Powell, J., concurring in part and concurring in the judgment).

---

[25] In a footnote, petitioner DAETC cites several FCC indecency decisions with apparent but unexplained disapproval. See DAETC Br. 34 n.47. Petitioner's terseness is understandable, for the cited material contains explicit and graphic descriptions of sexual activities. See, *e.g.*, *In re Infinity Broadcasting Corp.*, 3 FCC Rcd 930, 934 (1987), modifying *In re Pacifica Foundation, Inc.*, 2 FCC Rcd 2698 (1987); *In re KSD-FM*, Notice of Apparent Liability, 6 FCC Rcd 3689, 3690 (1990). See also, *e.g.*, *In re Regents of Univ. of California*, 2 FCC Rcd 2703 (1987); *In re Infinity Broadcasting Corp.*, 2 FCC Rcd 2705, 2706 (1987).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

WILLIAM E. KENNARD
General Counsel

FRANK W. HUNGER
Assistant Attorney General

CHRISTOPHER J. WRIGHT
Deputy General Counsel

LAWRENCE G .WALLACE
Deputy Solicitor General

DANIEL M. ARMSTRONG
Associate General Counsel

JAMES A. FELDMAN
Assistant to the Solicitor General

JONATHAN E. NUECHTERLEIN
Counsel
Federal Communications Commission

BARBARA L. HERWIG
JACOB M. LEWIS
MICHAEL S. RAAB
Attorneys

JANUARY 1996

☆ U. S. GOVERNMENT PRINTING OFFICE: 1996 405017 40058